Supreme Court, U.S.
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OFFICE OF THE CLERK

No. ———

In the Supreme Court of the United States

JOHN H. METZ,
Petitioner,

v.

THE SUPREME COURT OF OHIO, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a deputy clerk has the judicial power to determine whether she will accept or reject motions and briefs for filing with the court.

2. Whether the United States Constitution permits a deputy clerk sole and full discretion in determining whether motions or briefs will be filed with the highest court in the State.

3. Whether a deputy clerk can deny access to the State's highest court by reading a motion and determining whether it is a "permissible" motion or not.

4. Whether an attorney has standing to challenge the denial of access to the Courts or if only each individual litigant has such standing.

5. Whether a rule of a state court that operates to permit non-judge employees to exercise judicial power without also providing a rule granting Petitioner or those similarly situated recourse to a judicial determination of the propriety of a non-judge's actions constitutes a deprivation of Due Process rights in violation of the United States Constitution.

6. Whether an attorney in his representative capacity has a standing to seek declaratory and injunctive relief from the federal courts to declare a state court's rule to be unconstitutional where operation of that rule has the effect of denying Petitioner his Due Process Rights as guaranteed to him by the United States Constitution, by allowing ministerial employees of the state court to exercise the powers of judicial office.

7. Whether a State may Constitutionally create a rule which gives judicial power to a non-elected non-judicial employee of the Court and thereby permit its citizens to be adjudged by others than the judiciary.

8. Whether a State by empowering a deputy clerk to refuse certain motions tendered by attorneys without any judicial review (or avenue of review) violates the Constitutional right of access to the courts.

9. Whether a state law that require a clerk of the Supreme Court to post a bond conditioned upon the faithful discharge of the duties of office operates as a waiver of sovereign immunity so that the clerk of the Ohio Supreme Court may face suit in Federal Court.

10. Whether for purposes of determining standing, the refusal of a deputy clerk to file pleadings with the court creates an "injury in fact and an invasion of a legally protected interest."

11. Whether an licensed attorney has a legally protected right under the U.S. Constitution to have access to a judicial review of pleadings at some point prior to dismissal.

12. Whether the First Amendment's right to petition is violated when access to the court is blocked by a deputy clerk's refusal to filing pleadings that are not to her personal liking.

13. Whether 42 U.S.C. Section 1983 protects against a deputy clerk under color of State law repeatedly denying access to the court by refusing to file pleadings with the court.

14. Whether this court's decision in *Shadwick v. City of Tampa*, 407 U.S. 345 (1972) is to be interpreted and extended to hold that a clerk of courts may make judicial determinations which block the party from obtaining any "judicial" review of their pleadings prior to dismissal of the case.

15. Whether this court will address the conflict between the case *sub judice* and that of *McCray v Maryland*, 456 F.2d 1 (4th Cir. 1972)which held that it is a denial of a constitutional right for a clerk by refusal or neglect to impede the filing of pleadings.

16. Whether this court will address the conflict between the case *sub judice* and *Powers v. Ohio*, 499 U.S. 400, 410-411 (1991)relative to an attorney having *jus tertii* standing.

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is John H. Metz, an individual citizen of the United States. Plaintiff has no corporate affiliations.

Respondent

Respondents are Ohio Supreme Court's Deputy Clerk Mary Ann Dix, Clerk Marcia Mengel (and the Ohio Supreme Court itself for purposes of injunctive relief only).

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OPINIONS BELOW

The opinion of the Court of Appeals was entered on August 19, 2002 and is reproduced in Appendix A at 1a. The opinion and order of the United States District Court for the Southern District of Ohio Western Division was entered on January 16, 2001 and is reproduced in Appendix B at 19a.

STATEMENT OF JURISDICTION

This is a direct appeal from the Sixth Circuit's affirmance of the District Court's granting a dismissal on January 16, 2001, pursuant to FRCP 12(b)(6) involving claims pursuant to 42 U.S.C. §1983. Jurisdiction to review judgment by certiorari is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, among other things, that "no person shall. . . be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V.

STATEMENT OF THE CASE

Basis Of Jurisdiction In First Instance

This is a direct appeal from the Sixth Circuit's affirmance of the District Court's granting a dismissal on January 16, 2001, pursuant to FRCP 12(b)(6) involving claims pursuant to 42 U.S.C. §1983.

STATEMENT OF THE FACTS

This case involves two factual matters: 1) the refusal of a clerk to accept for filing a merit brief when presented to the clerk before 5:00 p.m. [closing time](which led to a dismissal of the appeal); and 2) the clerk's ruling that appellant's Motion for Reconsideration (of the dismissal) was an "impermissible motion" and refused to even accept said motion to go before the Ohio Supreme Court.

At the onset it is of importance to note that appellant had properly filed a Notice of Appeal and jurisdiction of the Ohio Supreme Court was attained. Appellant was merely filing the Merit Brief in support of the appeal with the clerk.

The Ohio Supreme Court's Rule of Practice XIV, Section 1. Filing With the Supreme Court states:

> (A) *Filing Defined.* The filing of memoranda, briefs, pleadings, notices, and other documents with the Supreme Court as required by these rules shall be made by filing with the Clerk of the Supreme Court during regular business hours of the Clerk's Office. Documents received in the Clerk's Office after 5:00 p.m. shall not be filed until the next business day. Only submissions filed in accordance with this provision will be considered by the Supreme Court.
>
> *****
>
> (C) *Prohibition Against Untimely Filings.* No pleading, memorandum, brief, or other document may be filed after the filing

deadlines imposed by these rules or as extended in accordance with Section 3(B)(2) of this rule or with S.Ct. Prac. R. XIX. The Clerk shall refuse to file a pleading, memorandum, brief, or other document that is not timely tendered for filing. Motions to waive this rule are prohibited and shall not be filed.

Ohio Supreme Court Rule of Practice XI contains provisions to request "Reconsideration:"

Section 2. Motion for Reconsideration:"

(A) A motion for reconsideration may be filed within 10 days after the Supreme Court's judgment entry or order is filed with the Clerk. A motion for reconsideration shall be confined strictly to the grounds urged for reconsideration, shall not constitute a reargument of the case, and may be filed only with respect to the following:

(1) The Supreme Court's refusal to grant jurisdiction to hear a discretionary appeal;

(2) **The sua sponte dismissal of a case**

(3) The granting of a motion to dismiss

(4) A decision on the merits of a case.

(C) The Clerk shall refuse to file a motion for reconsideration that is not expressly permitted by this rule or that is not timely.

The issue of what time the Merit Brief was presented to the clerk is a factual scenario. The deputy clerk correctly foretold that the Court always backs up her up and such was true since the Clerk herself deferred to this deputy clerk. Appellant realizes that that particular issue may be difficult if not impossible to win. But under FRCP 12(b)(6) the court must accept as true all factual allegations in the complaint. However, more importantly herein, the second step taken by this deputy clerk to refuse to accept a Motion for Reconsideration based upon her reading and her interpretation of it clearly goes beyond the pale and permits non-judicial employees to exercise "judicial" power and to bar access to the judiciary.

Appellant, an attorney licensed to practice law in the state of Ohio, was representing clients whose Merit Brief was due in the Supreme Court of Ohio on July 1, 1998. The Merit Brief was completed on July 1, 1998, and presented for filing in the Clerk of the Ohio Supreme Court's (Clerk's) office on that same day before the Clerks Office's regular closing time of 5:00 p.m. As factually set forth in the Complaint, Petitioner arrived at 4:58 p.m. and entered the clerk's office through doors that were physically open. Deputy Clerk Dix was at the desk and talking on the phone. Two other clerks remained seated at their desks preparing their personal items to leave. Dix continues talking on the phone. Petitioner heard Dix say, "I have to go," three times as Petitioner had time to fan-out all the copies of the brief on the counter to facilitate stamping. When Dix finally got off the phone Petitioner said that he so as to make it before the office closed. Dix responded that Petitioner was too late and

she refused to file the brief but offered to throw all the copies and the originals in the trash. Mary Ann Dix (hereinafter "Dix") claimed the 5:00 p.m. closing time had passed, and that Appellant's Clients' Merit Brief would not be filed that day, and that the Merit Brief and accompanying Supplement would not be presented to the Court. When Appellant asked Dix to speak to the Clerk, Marcia Mengel ("Mengel"), personally, Dix refused, stating she (Dix) had complete authority over filings and would make the final determination of whether to accept the Merit Brief for filing. When Appellant insisted on bringing the matter to the attention of someone in a position of higher authority than Dix, Dix informed Appellant that there was no one higher than Dix to whom Appellant could speak Appellant then asked Dix to accept the Merit Brief for filing on the following day. Dix accepted one copy of the Merit Brief and Supplement, and informed Appellant that the materials would merely be returned to him the following day showing they were not timely filed.

Appellant attempted to contact the head clerk, Mengel, the following morning, only to be told she was on "extended leave". The person on the phone in the Clerk's office offered to allow Appellant to speak to Dix. Appellant told the person in the Clerk's office that speaking to Dix would not be fruitful, but nonetheless Dix came to the phone. Dix curtly recited the rules to Appellant and told Appellant she would be mailing the filings to him.

On July 9, 1998, Appellant received the filings from the Clerk's office showing the materials Merit Brief and Supplement had not been filed on the next day, as is required by the rules of the Supreme Court. In the place of a time-stamp indicating the Brief had been accepted for filing, Dix

simply wrote on each document, "Received in the clerk's office after 5:00 p.m. on July 1st, 1998."

So that the Ohio Supreme Court could address Dix's conduct regarding the Merit Brief and Supplement, on Thursday, July 16, 1998, Appellant sent via Federal Express next day service a pleading containing Appellant's Motion to Grant Emergency Relief; Motion to File Merit Brief and Supplement Instanter; Motion Not to Dismiss Appeal; Motion to Order Correction of the Docket; and Motion to Issue a Mandate to the Clerk to File Relator's Merit Brief and Supplement.

On the next day, July 17, Appellant received in the mail a "Judgment Entry" reflecting the *sua sponte* dismissal of the Clients' appeal for not filing "a merit brief, due July 1st, 1998." The Entry was date-stamped "July 10;" [oddly, the postmark on the envelope indicated "July 14"]. Likewise, Dix's July 2nd letter accompanying the returned Merit Brief and Supplement was postmarked "July 6," but not received until July 9th. Each mailing was postmarked four days later than the date of the letter or Entry.

Also on the morning of July 17, 1998, Appellant received a call from "Amy" in the Clerk's office informing Appellant that his several motions had been received, but that the motions would not be filed since the case had already been dismissed.

After learning on July 17th that his Clients' appeal had been dismissed on July 10th, Appellant drafted a Motion for Reconsideration – specifically provided for under Ohio Supreme Court Rule XI, §2 – which was mailed sent via Federal Express to the Clerk's office on Monday, July 20, 1998. July 20th was the last day such a motion could be filed;

thus, the Motion for Reconsideration was timely filed under the Rules of the Ohio Supreme Court.

Not surprisingly, Appellant was informed by the Clerk's office on July 20th that because the Motion for Reconsideration asked the Court "in the alternative" to reconsider the Clerk's refusal to file prior filings, such language "incorporated [Appellant's] request for reconsideration into the impermissible motion, the document cannot be filed". Apparently Petitioner's mention of Dix's conduct on the motion transformed a proper motion into an "impermissible" one according to the clerk's office interpretation and ruling. Therefore the clerks completely foreclosed all avenues of judicial review of this matter.

The instant litigation ensued thereafter. The District Court dismissed for lack of standing. The Circuit Court merely adopted the analysis and ruling of the District Court. Petitioner timely filed a writ of certiorari with this Court.

ARGUMENT

First, the petitioner-attorney herein has standing to press his 42 U.S. 1983 claim against the Supreme Court of Ohio and the ministerial employees of that Court whose actions under color of state law constitutes a denial of appellant's Due Process Right as guaranteed to him by the United States Constitution.

Second, the actions of the Clerk of the Supreme Court of Ohio in fact constituted a denial of the appellant's Due Process rights in that the Clerk exercised the powers of a judges, which conduct was well beyond the authority vested in her. The District Court's dismissal of the within action on this ground was error.

Third, the District Court committed error when it determined the Eleventh Amendment to the United States Constitution precluded this appellant from seeking relief, when under the circumstances of this case such relief was well warranted. By granting a 12(b)(6) the court is saying the alleged factual scenario does not even state a case. This case where individuals abusing their power under color of state law violating fundamental rights is precisely the purpose of 42 U.S. C. § 1983.

The district court's decision turns mainly on its conclusion that plaintiff had no "standing" to pursue the case. The court concluded that plaintiff had no "injury-in-fact." Secondarily, the district court appeared to go and determine the merits of the case concluding that the court saw nothing wrong with the clerk's refusal to accept plaintiff's motion to file the merit brief. Lastly, the court found 11th Amendment immunity and no jurisdiction. Since the court based its decision upon these three conclusions, appellant will address those three issues.

I. STANDING

The District Court misconstrued the factual scenario behind this matter; therefore, the inappropriate test for standing to sue was applied to all of the Petitioner's causes of action.

In the District Court's Order of January 16, 2001, the District Judge applied the standing test of *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), which teaches that standing will be established when the Plaintiff demonstrates he has "suffered injury in fact – an invasion of a legally protected interest which is concrete and particularized, and actual and imminent; there must be a causal connection

between the injury and the conduct complained of – the injury must be traceable to the challenged action of the defendant and the not the result of the independent action of some third party not before the court; and it must be likely, and not merely speculative, that the plaintiff's injury will be redressed by a favorable decision from the court."

While this is the proper test for determining whether standing to seek retrospective relief has been established, the proper test for determining whether standing to seek declaratory or injunctive relief has been established is the test set forth in *Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). In order for a Plaintiff to have standing to seek injunctive and declaratory relief, he must show a "real or immediate likelihood that the plaintiff will be wronged again – a 'likelihood of substantial and immediate irreparable injury.'" *Id.*

The District Court below concludes that it is only a lawyer's client who has a right of access to the courts, and an attorney has no such right. The district court fails to appreciate the nature of this case. Plaintiff-attorney is not suing for the Mandamus/Prohibition relief which was being appealed in the clients' appeal. This case is that of an Ohio attorney who has attempted to have the highest court of the State of Ohio accept for filing a motion which the CLERK has refused to accept for filing and completely blocked judicial access to plaintiff. This presents the most drastic and absolute denial of access to the courts from one who is licensed and whose "right" to access to the courts is fundamental to performing his occupation. The parties to the underlying appeal is irrelevant no matter what caption is on the papers it is defendants' repeated refusals to allow access to the court that is the gist of the case. It is Petitioner's access to due process that is being affected by defendant's conduct.

Attorneys have been found to have standing to advance the rights of their clients (*United States Dept. of Labor v. Triplett*, 110 S. Ct. 1428 (1990) ; *Caplin & Drysdale v. United States*, 109 S. Ct. 2646, 2651 n.3 (1989). [Physicians have frequently had standing to assert their patients' rights. (*Singleton v. Wulff*, 428 106, (1926); *Doe v. Bolton*, 410 U.S. 179 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972), *Griswold v. Connecticut*, 381 U.S. 479 (1965)].

However, as stated above, it is plaintiff's rights, not that of plaintiff's clients, that are the subject of the complaint which was dismissed herein. Plaintiff, as an attorney, does have a right involved in this matter and has suffered an "injury" to such right and clearly this plaintiff and others similarly situated will continue to suffer such violations if such practice is not reviewed by the federal court.

For the Fourteenth Amendment to be applicable that interest must be a protectible property or personal interest. The Supreme Court has decided that something so simple as a person's interest in his or her driving privileges is such a protectible interest. (*Mackey v. Montrym* (1979), 443 U.S. 1, 99 S.Ct. 2612, 61 L.Ed.2d 321; *Bell v. Burson* (1971), 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90.)

The Court has specifically held: "Lawyers do indeed occupy professional positions of responsibility and influence that impose on them duties correlative with ***their* vital right** of access to the courts." (*Application of Griffiths*, (1973) 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910. [emphasis added].

The district court herein however found that the right to practice law is not a privilege or immunity secured by the Fourteenth amendment, citing *Bradwell v. Illinois*, 83 US 130 (1872). *In re Griffiths*, 413 US 717 (1973) does not so hold.

Bradwell's antiquated holding addressed whether women should be admitted to the practice of law; clearly, *Bradwell* is distinguishable from the case at bar.

However, the Sixth Circuit has recognized that the freedom to pursue a career is a protected liberty interest, and that state regulation of occupations through a licensing process gives rise to protected property interests. (*Wilkerson v. Johnson*, 699 F.2d 325, 328 (6th Cir. 1983). The right to pursue one's chosen profession has been found to be a "fundamental right of citizenship." (*People v. Love*, (1921), 298 Ill. 304, 310, 131 N.E. 908. It has also been held that an individual has a fundamental right to pursue a particular occupation for which he is trained. (*ILG Industries v. Scott* (1971), 49 Ill. 2d 88, 93, 273 N.E.2d 393).

The right to practice law is a privilege which is protected by the Constitution. However, a state may not exclude a person from the practice of law for reasons that contravene the due process or equal protection clauses of the United States Constitution. (*Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39, 77 S.Ct. 752, 756, 1 L.Ed.2d 796, 801 (1957).

"It requires no argument to show that the right to work for a living in the common occupation so the community is of the very essence of the personal freedom and opportunity that it was the purpose of the (Fourteenth) Amendment to secure." (*Truax v. Raich*, 239 U.S. 33, 35, 36 S.Ct. 7, 8, 10, 60 L.Ed. 131 (1915).

The right to practice law has been recognized not merely as a privilege but as property that can be taxed. *Cox v. Huddleston*, 914 S.W.2d 501(1995).

There is a constitutional protection of the right to practice law if the national requirements of bar admission are met. (*Rosenfled v. Clark* (D.Vt. 1984), 586 F.Supp. 1332, 1338, aff'd (1985), 760 F.2d 253).

A right to practice law is severely limited (if not rendered meaningless), if one's access to the judiciary is denied. The U.S. Supreme Court has denominated such lawyers' right as "their vital right of access to the courts." (*Application of Griffiths*, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910).

The relief being sought here is primarily injunctive, in looking to the federal courts for protection where a State court enacts rules which permit a clerk to exercise purely judicial functions in ruling on motions and precluding access to the judiciary. What could be a more fundamental violation?

"Access to the courts has been defined as 'all the means a defendant or petitioner might require to get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him.' *Gilmore v. Lynch*, 319 F.Supp. 105, 111 (N.D. Cal. 1970, *aff'd sub nom, Younger v. Gilmore*, 404 U.S. 15, 92 S.C.t. 250, 30 L.Ed..2d 142 (1971)(per curiam)."

"The Fifth Circuit discerns three bases in the Constitution for the right of access to courts – the privileges and immunities clause in article four, the right to petition for redress of grievances under the first amendment, and the right to due process under the fourteenth amendment." (*Ryland v. Shapiro*, 708 F.2d 967, 972 (5th Cir. 1983).

Access to the courts is "part of the right to petition protected by the First Amendment." *California Motor*

Transport Co. v. Trucking Unlimited, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed. 642 (1972).

Access to courts is a privilege of American citizenship protected by the Fourteenth Amendment (*Chambers v. Baltimore & Ohio Railroad Co.*, 207 U.S. 142, 28 S.Ct. 34, 52 L.Ed. 143 (1907). Certainly such right is not one of those rights which are sacrificed by obtaining a license to practice law.

The courts have repeatedly found and protected inmates' right to access of the courts. An inmate has a fundamental constitutional right of meaningful access to the courts. (*Bounds v. Smith*, 430 U.S. 817, 828, 97 S.Ct. 1491, 1498, 52 L.Ed. 72, (1977); *Alston v. DeBruyn*, 13 F.3d 1036, 1040-42 (7th Cir. 1994).

If a convicted inmate has a superior right to access the courts over that of an attorney admitted to practice law, then the system has come full topsy-turvy.

II. CLERK'S REFUSAL TO FILE AND HER RULING ON MOTION

The lower court here, while claiming to take the allegations as true, nonetheless clearly went beyond the pleadings and made assumptions and conclusions outside the pleadings to come to its dismissal of the case. For example, the court makes several comments that counsel may be concerned about a malpractice claim and mistakenly assumes it is a basis for the suit. There is no such hint of this in the pleadings and rather inappropriate for the court to so conjecture when applying FRCP 12 (b)(6).

The district court then "reads the entirety of Rule of Practice XIV" and concludes it is "not as rigid and unyielding as Plaintiff's pleadings would have one believe." The court comments: "Plaintiff has not explained why he did not pursue any of these other options for filing his brief, but his failure to file his client's brief in compliance with the rules is completely a problem of his own making."

(Since in ruling on a 12(b)(6) motion one is not to go outside the pleadings in making these rulings, plaintiffs did not believe the burden of "explaining" was at issue. In any event, factually, if it is relevant at this juncture, plaintiff had, in fact, pursued such options.)

The district court, while dismissing the case, nonetheless amazingly concluded that the judicial act of the deputy clerk making rulings and determining which motions would be accepted is permissible. The court relying on *Shadwick v. City of Tampa*, 407 U.S. 345 (1972), ruled that if a clerk can determine probable cause, a clerk could bar the courthouse door. If it is constitutional for clerks to rule on motions, why do we need the judiciary?

Applying *Shadwick*, the District court opined that "if a clerk of court can be entrusted to issue an arrest warrant, which places a person's liberty at stake, within the bounds of the Fourth Amendment, then this court can see no reason, within the limits of the Due Process Clause, to make the determination whether an appellant's merit brief was filed in accordance with the applicable rule of practice."

It cannot be seriously argued that the *Shadwick* Court intended for a clerk of court to issues a warrant and then have the decision to issue the warrant escape any future form of judicial scrutiny. If a warrant is improperly issued, it is the

role of the courts to remedy the matter by judicial review at some point. It is evident the District Court attempted to avoid this absurd result, with its specific inclusion of the clause: "within the limits of the Due Process Clause" to modify the power of the clerk to determine the propriety of a filing. Under these circumstances, the Due Process clause should require the opportunity to seek judicial review of the contested action of a clerk. Of course, the courts may exercise their power to deny those motions, but that is the prerogative of the Court, not the clerk. If this scheme is permitted it effectively abrogates all of the Court's equitable powers.

Nevertheless, the Due Process Clause of the 14th Amendment should require a court to provide adequate mechanisms to allow the Appellant and those similarly situated to have access to judicial review of the legitimately contested actions of court employees or, in the alternative, refuse to permit non-judges from determining the propriety of filings, leaving it to the adversarial system of justice to sort the matter out.

Contrary to the district court's opinion, where a court clerk impedes the filing of papers the clerk can be liable under 42 U.S.C. § 1983. (*McCray v. Maryland*, 456 F.2d 1 (4th Cir. 1972). As the *McCray* court stated: "Of what avail is it to the individual to arm him with a panoply of constitutional rights if, when he seeks to vindicate them, the courtroom door can be hermetically sealed against him by a functionary who, by refusal or neglect, impeded the filing of his papers?" (*McCray*, 456 F.2d at 6).

In *McCray* the court reversed the district court's dismissal where the clerk impeded filing and held "it is unmistakably clear from the face of the complaint that it sufficiently alleges that he was barred access to the courts.

This denial of a constitutional right of momentous importance is redressable under section 1983." [*McCray, supra*].

The court in *Ginsburg v. Stern*, 125 F. Supp. 596, 601 (W.D. Pa. 1954) held that a clerk's failure to file papers would be a "patent" violation of constitutional rights.

In *Loya v. Desert Sands Unified High School District*, 721 F.2d 279 (9th Cir. 1983), a clerk refused to file a complaint which was on the wrong size paper. The Court held that the district court's dismissal as untimely was error. The court stated: "To uphold the Clerk's rejection of it would elevate to the status of a jurisdictional requirement a local rule designed merely for the convenience of the court's own record keeping. While such interests are important, local rules to serve them should not be applied in a manner that defeats altogether a litigant's right to access to the court."

The court in *McDowell v. Delaware State Police*, 88 F.3d 188 (3rd Cir. 1996), held that the clerk improperly refused to docket a pleading and held that the document should be considered filed and related back.

The Clerk of Court and his deputies are ministerial officers. (*Midwestern Developments, Inc. v. City of Tulsa, Oklahoma*, 319 F.2d 53 (10th Cir. 1963); *United States v. Bell*, 127 F. 1002, 1003 (C.C. E.D. Penn. 1904), *aff'd*, 135 F. 336 (3rd Cir. 1905). *Black's Law Dictionary* defines a ministerial officer as "[o]ne whose duties are purely ministerial, as distinguished from executive, legislative or judicial functions, requiring obedience to the mandates of superiors and not involving the exercise of judgment or discretion." *Black's Law Dictionary* 899 (5th Ed. 1979). A clerk "has nothing to do with the character or purpose of papers which are tendered to him to be filed." *United Sates v.*

Bell, 127 F. at 1003. And it is clear that a clerk "may not assume judicial powers." (*Midwestern Development, Inc.*, 319 F.2d at 53).

In *Transamerica Corporation v. National Union Fire Insurance Company of Pittsburgh, PA*, 143 F.R.D. 189, 25 F.R.Serv.3d 200 (1992), the district court entered a General Order correcting a local rule which directed clerks to refuse to accept certain papers for filing and noted:

> "Several local district rules have directed the office of the clerk to refuse to accept for filing papers not conforming to certain requirements of form imposed by local rules or practice. This is not a suitable role for the office of the clerk, and the practice exposes litigants to the hazards of time bars; for these reasons, such rules are proscribed by this revision. The enforcement of these rules and of the local rules is a role for a judicial officer."

Attorneys have clearly been found to have standing to address courts rules that deny Constitutional rights. A *pro se* attorney attacked the constitutionality of Hawaii's rule which precluded speaking with jurors after a jury trial and sought injunctive relief enjoining and restraining the State Disciplinary Board of the Supreme Court and the Justices of the Hawaii Supreme Court from enforcing or attempting to enforce said rule. In *Rapp v. Disciplinary Board of the Hawaii Supreme Court*, 916 F. Supp. 1525, the federal court held such a rule was unconstitutional and granted injunctive relief.

In a similar case to the case *sub judice*, the court in *McCray v. Maryland*, 456 F.2d 1 (4th Cir. 1972), was faced

with reviewing a dismissed complaint where a clerk refused to file papers from an inmate. The Circuit Court in vacating and remanding concluded:

> "If plaintiff's allegations are true, it is clear that his constitutionally based right of access to courts has been violated. *See Boddie v. Connecticut*, 401 U.S. 371, 376, 91 S.Ct. 780, 28 L.e.d2d 113 (1971) (access to courts protected by due process clause); *Chambers v. Baltimore & Ohio Railroad Co.*, 207 U.S. 142, 28 S.C.t 34, 52 L.Ed. 143 (1907) (access to courts is a privilege of American citizenship protected by the Fourteenth Amendment); *Ginsburg v. Stern*, 125 F. Supp. 596, 601 (W.D. Pa. 1954) (clerk's failure to file papers would be a "patent" violation of constitutional rights)....it is unmistakably clear from the face of the complain that it sufficiently alleges that he was barred access to the courts. This denial of a constitutional right of momentous importance is redressable under section 1983."

III. ELEVENTH AMENDMENT WAIVER

The district court summarily found that the Eleventh Amendment "bars suit in federal court against state officials who have allegedly violated state law." It is unclear as to whether the court considered the injunctive relief or not. Clearly the Supreme Court has recognized an exception the 11th Amendment general rule, in that a plaintiff may challenge the constitutionality of a state official's action by seeking prospective injunctive relief. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (citing *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). If the plaintiff asks

the federal court to enjoin the official's future unconstitutional conduct, the Eleventh Amendment presents no bar, because unconstitutional actions by state officials cannot be authorized by a state. (*Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

Clearly in this situation, with their unfettered power and assurance that the Ohio Supreme Court will always back up the deputy clerk, there is a "substantial likelihood that the past challenged official conduct will recur in the future." *Nelsen v. King County*, 895 F.2d 1248, 1250 (9th Cir. 1990); *City of Los Angeles v. Lyons*, 461 U.S. 95, 108, 103 S.Ct. 1660, 1668-69, 75 L.Ed.2d 675 (1983). The facts of this very case demonstrate that this type of action occurred at least twice in this particular case (1: refusal to accept brief; and 2: refusing to allow petitioner's motion for reconsideration to even be filed). Likewise the clerk's comment that the clerk is always upheld demonstrates that this has not been the first such situation.

REASONS FOR ALLOWING THE WRIT

The facts of this case present a fundamental affront to the basic citizen's right to access to our courts. The tyrannical display of power under color of state law by this deputy clerk is precisely the type of case which cries out for judicial scrutiny. If a citizen's access to petition his government is cut-off by a deputy clerk's discretion we have no legal system, once again we have tyranny.

This case can address the apparent conflict between the circuits as to who does have "standing" to protect fundamental rights. This case presents the issue of one's Constitutional right to fully pursue one's chosen profession without arbitrary constraints absent judicial review.

Allowing this case to go unheard would evidence that our system of justice does not work and that tyranny reigns over this Country once again. In not addressing this case this precedent would be an incentive for further abuse by such governmental employees.

The citizens of this country need to know that this highest court will not tolerate such violations to our basic Constitutional Rights.

CONCLUSION

Wherefore, the Petitioner respectfully requests this Court to grant a writ of certiorari so as to reverse the decision of the District Court and the Circuit Court, and to remand this action for further proceedings consistent with the United States Constitution.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 01-3149

[Filed August 19, 2002]

JOHN H. METZ,
Plaintiff-Appellant,

v.

THE SUPREME COURT OF OHIO, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Ohio
00-00539
Beckwith 01-16-01

JUDGES:
Before SILER, COLE and CLAY, Circuit Judges.

OPINION

CLAY, Circuit Judge. Plaintiff John H. Metz, a Cincinnati attorney licensed to practice law in the State of

Ohio, appeals from the order granting the motions filed by Defendants, the Supreme Court of Ohio, et al., dismissing his complaint alleging a violation of 42 U.S.C. § 1983 wherein he challenged actions taken by Defendants when he attempted to file a merits brief on behalf of a client in an appeal before the Ohio Supreme Court. For the reasons set forth below, we **AFFIRM** the district court's judgment.

BACKGROUND

A. Procedural History

On July 3, 2000 Plaintiff filed a complaint pursuant to 42 U.S.C. § 1983 against Defendants, the Supreme Court of Ohio and its individual justices, Supreme Court Clerks Marcia Mengel and Mary Ann Dix, and Attorney General Betty D. Montgomery. According to a rule promulgated by the Ohio Supreme Court, Ohio S. Ct. Prac. R. XIV, pleadings received in its Clerk's Office after 5:00 p.m. will not be filed until the next business day. Plaintiff's complaint alleged that on July 1, 1998 the Supreme Court of Ohio refused to accept his merits brief, which he attempted to file on behalf of a client whom he was representing in a malpractice action before the Supreme Court, even though he claimed to have presented the brief before the 5:00 p.m. filing deadline. As a result, the appeal in the underlying malpractice action was dismissed.

In an amended complaint, Plaintiff alleges, in pertinent part, that Ohio S. Ct. Prac. R. XIV violates the Ohio Constitution by allowing non-judicial officers to determine what pleadings will be placed before the court. Plaintiff also alleges that Ohio S. Ct. Prac. R. XIV violates prior case law of the Ohio Supreme Court. In addition, Plaintiff claims that

the rule violates the Due Process Clause of the Fourteenth Amendment by vesting judicial power in the hands of non-judicial officers. Plaintiff also alleges that, as an attorney, his due process rights were violated because he has a property right in practicing law and in having access to the courts in the State of Ohio. Plaintiff further claims that the enforcement of Ohio S. Ct. Prac. R. XIV violates the Privileges and Immunities Clauses of the U.S. Constitution. In his amended complaint, Plaintiff sought an injunction prohibiting the Ohio Supreme Court from allowing its non-judicial employees to wield judicial power, a ruling that Ohio S. Ct. Prac. R. XIV is unconstitutional as applied, and monetary damages, including punitive damages, against Defendants Dix and Mengel.

On July 27, 2000, Attorney General Montgomery filed an unopposed motion to dismiss the claims against her, claiming that Plaintiff's complaint failed to state any specific allegations against her. The remaining Defendants filed a motion for judgment on the pleadings on August 30, 2000, claiming that Plaintiff's complaint failed to state a claim upon which relief could be granted. In particular, the Ohio Supreme Court claimed sovereign immunity under the Eleventh Amendment for itself and its members. Defendants also requested the dismissal of Plaintiff's state-law claims, alleging lack of subject-matter jurisdiction. Defendants further claimed that Plaintiff's claims based upon due process and the Privileges and Immunities Clauses failed to state claims for which relief can be granted, and thus should be dismissed as well.

Plaintiff responded on September 20, 2000 with a memorandum in opposition to Defendants' motion for a

judgment on the pleadings and moved to amend his complaint. In his brief, Plaintiff argued that the district court had jurisdiction to provide injunctive relief against the Ohio Supreme Court and its individual members. Plaintiff also claimed that the Ohio Supreme Court waived its sovereign immunity with respect to Defendants Dix and Mengel because Ohio law requires the Clerk of the Ohio Supreme Court to post a bond. Thereafter, on November 3, 2000, Plaintiff filed an amended complaint clarifying that the individual justices of the Ohio Supreme Court were being sued in their official capacities only for purposes of injunctive relief and that Defendants Dix and Mengel were being sued in their individual and official capacities. In response, Defendants filed a motion to dismiss the amended complaint on November 14, 2000.

In an opinion and order filed on January 16, 2001, the district court dismissed the claims against Attorney General Montgomery and granted in part both Defendants' motion to dismiss and their motion for judgment on the pleadings, specifically finding that Plaintiff had no standing to assert his due process claims and, alternatively, that no due process violations occurred. The district court also dismissed with prejudice Plaintiff's claim alleging deprivation of privileges and immunities under the Fourteenth Amendment and Article IV, § 2 of the United States Constitution. The district court further ruled that it lacked subject-matter jurisdiction over Plaintiff's state-law claims and declined to exercise supplemental jurisdiction over them. Plaintiff filed a timely notice of appeal from the district court's order.

B. Substantive History

Plaintiff's appeal arises from his attempt to file a merits brief with the Supreme Court of Ohio on behalf of a client in a malpractice case. Plaintiff claims that a Supreme Court clerk refused to accept the merits brief when it was presented to her before the 5:00 p.m. filing deadline on July 1, 1998. Defendants counter that the clerk refused to accept the brief because it was presented after the 5:00 p.m. filing deadline had passed. It is undisputed that pursuant to Ohio S. Ct. Prac. R. XIV (1)(A), pleadings received after 5:00 p.m. are not filed until the next business day. Under Ohio S. Ct. Prac. R. XIV, no brief shall be filed with the Supreme Court after the established deadline, and the Clerk of the Court is directed to refuse to file any untimely pleading.

According to Plaintiff, when he entered the building in Columbus, Ohio where the Supreme Court is located on July 1, 1998, he asked the security guard who stopped him to check his identification if it was after 5:00 p.m., and the guard responded, "No." Plaintiff then proceeded to the Supreme Court's Clerk's Office located on the third floor of the building. Upon entering, Plaintiff noticed that two employees were "gathering their things together to leave," and another employee, Defendant Mary Ann Dix, the Deputy Clerk, was talking on the telephone. When Dix got off the phone, Plaintiff offered to submit the brief for filing, believing that he had beaten the 5:00 p.m. deadline. Dix, however, informed Plaintiff that it was after 5:00 p.m. and that the Clerk's Office would not accept any filings for the day. According to Plaintiff, he pointed out that several clocks in the office indicated that it was 4:58 p.m. or 4:59 p.m., but that it was definitely not after 5:00 p.m. Dix then told

Plaintiff that once the computers were turned off, the Clerk would not accept any filings and that the computers were now off. Amended Complaint, PP 9-13. According to Plaintiff, he beseeched Dix to be reasonable, but she responded that "the clerk decides what time it is." Amended Complaint, P 14.

Plaintiff then asked to speak with Dix's superior, Defendant Marcia Mengel, the Clerk of the Ohio Supreme Court. After Dix told Plaintiff that Mengel had given her complete discretion over filings with the court, she nonetheless agreed to accept a copy of Plaintiff's brief to be filed as of the next business day, but told him that it would be returned to him showing that it had not been timely filed. On the way out of the building, Plaintiff stopped at the security checkpoint and noted that, according to the sign-in log, the security guard had checked him at 4:58 p.m.

The next day Plaintiff called the Clerk's Office and asked to speak with Mengel, but was told that she was on an extended leave of absence. Thereafter, Plaintiff talked with Dix, who again told him about the Ohio Supreme Court's filing rules, informing Plaintiff that his brief would be returned to him stamped late. On July 9, 1998, the Clerk's Office returned the brief to Plaintiff, with the handwritten note that it was "received in the clerk's office after 5:00 p.m. on July 1, 1998." (J.A. at 52.)

On July 16, 1998, Plaintiff attempted to file several motions on behalf of his client with the Supreme Court, including a motion to grant emergency relief, a motion to file a merits brief and supplement instanter, a motion not to dismiss appeal, a motion to order correction of the docket, and a motion to issue mandate to the clerk to file relator's

merits brief and supplement. On the following day, Plaintiff received in the mail a "Judgment Entry," reflecting the *sua sponte* dismissal of his client's appeal for failure to file "a merit brief, due July 1, 1998." (J.A. at 52-53.) Thereafter, Plaintiff drafted a motion for reconsideration and mailed it to the Clerk's Office via Federal Express on July 20, 1998. Plaintiff's timely motion for reconsideration with the Supreme Court was also rejected by the Clerk's Office. Plaintiff also alleges that he filed "writs of Prohibition and Mandamus as original actions with the Ohio Supreme Court to address this very case and all actions were dismissed and not heard on the merits." Original Complaint, P 49. Nearly two years later, on July 3, 2000, Plaintiff commenced the present action.

DISCUSSION

A. Standard of Review

This Court reviews *de novo* a district court's dismissal of a complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). *Performance Contracting, Inc. v. Seaboard Sur. Co.*, 163 F.3d 366, 369 (6th Cir. 1998). A motion to dismiss pursuant to Rule 12(b)(6) tests the sufficiency of the complaint. This Court "takes the plaintiff's factual allegations as true and if it appears beyond doubt that the plaintiff can prove no set of facts in support of its claims that would entitle it to relief, then ... dismissal is proper." *Forest v. United States Postal Serv.*, 97 F.3d 137, 139 (6th Cir. 1996).

B. Analysis

In this case, the district court did not err in granting Defendants' motions to dismiss Plaintiff's complaint pursuant

to Rule 12(b)(6) of the Federal Rules of Civil Procedure. First, the district court properly concluded that Plaintiff lacked standing to assert his due process claims. As Defendants point out, a plaintiff's standing under Article III is a component of a federal court's subject-matter jurisdiction. *Warth v. Seldin*, 422 U.S. 490, 498, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975) ("In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit."); *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 622 (6th Cir. 2000). In *Deja Vu of Nashville, Inc. v. Metro. Gov. of Nashville and Davidson County, Tennessee*, 274 F.3d 377, 389 (6th Cir. 2001), this Court stated the requirements for establishing standing under Article III as follows:

> To satisfy Article III's standing requirement, (1) a plaintiff must have suffered some actual or threatened injury due to the alleged illegal conduct of the defendant; (2) the injury must be "fairly traceable" to the challenged action; and (3) there must be a substantial likelihood that the relief requested will redress or prevent the plaintiff's injury. *See Coyne v. American Tobacco Co.*, 183 F.3d 488, 494 (6th Cir. 1999). The Supreme Court has further defined the injury-in-fact requirement by stating that a plaintiff must show "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v.*

Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

Deja Vu, 274 F.3d at 389. "Hypothetical injury does not equal injury-in-fact." *Id.* (citing *Lujan*, 504 U.S. at 560). To establish the injury-in-fact prong, the injury must generally be to the complaining party. *Warth*, 422 U.S. at 499 ("The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action.'")

In this case, Plaintiff cannot show that he has suffered a concrete, particularized invasion of a legally protected interest. Although Plaintiff's client in the underlying state court action suffered an apparent injury when his appeal of the malpractice action was dismissed due to Plaintiff's failure to file a timely merits brief on his behalf, Plaintiff's client is not the complaining party in the present action. *Id.* Here, Plaintiff has only shown that he suffered a "conjectural" or "hypothetical" injury. As the district court noted, excluding the possibility of having to defend himself against a malpractice action because of his failure to file his client's brief in a timely fashion, Plaintiff suffered "no discernible due process injury." Because the risk of having to defend against a potential malpractice action brought by his former client constitutes merely "conjectural" or "hypothetical" injury, Plaintiff fails to satisfy the first requirement for standing. *Deja Vu*, 274 F.3d at 389 (citing *Lujan*, 504 U.S. at 560).

However, even if Plaintiff were able to establish an injury-in-fact and that his presumed injury were "fairly traceable" to the challenged action in this case, he cannot establish that there is a substantial likelihood that the relief requested will redress or prevent his injury. In his amended complaint, Plaintiff seeks (1) an injunction prohibiting the Ohio Supreme Court from allowing its clerks to enforce its procedural rules, (2) a ruling that the Ohio Supreme Court's Rules of Practice XI(2)(C) and XIV(1)(C) are unconstitutional, and (3) further relief, including punitive damages, against Defendants Dix and Mengel, as may be appropriate. However, as Defendants point out, it is not clear that the requested relief would redress Plaintiff's injury of not being allowed to file his client's brief in the Supreme Court on July 1, 1998.

Nonetheless, Plaintiff rejoins that, as a lawyer, he has standing to advance the rights of his client. In *Powers v. Ohio*, 499 U.S. 400, 410-11, 113 L. Ed. 2d 411, 111 S. Ct. 1364 (1991), the Supreme Court explained the requirements for *jus tertii* standing as follows:

> In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties. This fundamental restriction on our authority admits of certain, limited exceptions. We have recognized the right of litigants to bring actions on behalf of third parties, provided three important criteria are satisfied: The litigant must have suffered an injury-in-fact, thus giving him or her a sufficiently concrete interest in the outcome of

> the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her interests.

Powers, 499 U.S. at 410-11 (footnote, citations and quotation marks omitted); *see also Tesmer v. Granholm*, 114 F. Supp. 2d 603, 608-10 (E.D. Mich 2000) (collecting cases). In particular, Plaintiff relies upon *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 105 L. Ed. 2d 528, 109 S. Ct. 2646, 109 S. Ct. 2667 (1989), where the Supreme Court, applying the three factor test stated in *Powers,* found that the petitioner attorney had *jus tertii* standing to assert the constitutional rights of his client, who was unable to pay his attorney fees because his assets were forfeited because they were found to have derived from drug-law violations. In that case, the Supreme Court found that the petitioner had standing on the ground that the attorney-client relationship is "one of special consequence" and that the statute might have materially impaired the client's ability to exercise his constitutional rights." *Caplin*, 491 U.S. at 624, n.3; *see also Tesmer*, 114 F. Supp. 2d at 610-11 (finding that attorneys who earned a portion of their incomes taking assigned appeals for trial and plea-based convictions had standing to challenge constitutionality of practice of denying appellate counsel to indigent Michigan defendants who pleaded guilty or nolo contendere).

However, in this case, Plaintiff cannot satisfy any of the three requirements for *jus tertii* standing. First, Plaintiff, as the litigant, has not "suffered some injury-in-fact, adequate to satisfy Article III's case-or-controversy requirement." *Caplin*, 491 U.S. at 624, n.3. Further, even assuming that

Plaintiff has suffered such an injury-in-fact, prudential considerations counsel against *jus tertii* standing in this case. Specifically, it is not apparent that Plaintiff has a sufficiently close relationship with the third party (his former client) such that the latter was prevented from exercising his own rights to protect his interests. Although the attorney-client relationship between Plaintiff and his client is, "like the doctor-patient relationship ... one of special consequence," the *jus tertii* doctrine is not available to Plaintiff in this instance because there was nothing that prevented his client from suing on his own behalf. *Cf. Eisenstadt v. Baird*, 405 U.S. 438, 443-446, 31 L. Ed. 2d 349, 92 S. Ct. 1029 (1972) (finding that a medical doctor had standing to assert the rights of unmarried persons denied access to contraceptives).

In any event, even assuming *arguendo* that Plaintiff had standing to assert his due process claims, he has failed to state a claim upon which relief can be granted. First, Plaintiff cannot show that he was denied the due process of law on the ground that the Ohio Supreme Court's vested judicial authority in a non-judicial officer. As pointed out by the district court, there was no apparent due process violation when a clerk of the court is entrusted to make the determination whether Plaintiff's merits brief was filed in accordance with the applicable rules of practice governing the Supreme Court of Ohio. In reaching this conclusion, the district court relied upon the U.S. Supreme Court's decision in *Shadwick v. City of Tampa*, 407 U.S. 345, 351-52, 32 L. Ed. 2d 783, 92 S. Ct. 2119 (1972), holding that a municipal ordinance allowing the clerk of the court to issue arrest warrants for breaches of other municipal ordinances did not violate the Fourth Amendment. Specifically, the district court noted that *Shadwick* permitted the clerks in Tampa to make

determinations of probable cause for arrest based upon affidavits "whether there was probable cause to believe a citizen guilty of impaired driving, breach of peace, drunkenness, trespass, or the multiple other common offenses covered by a municipal code." *Shadwick*, 407 U.S. at 352. In *Shadwick,* the Court, finding that "there has been no showing that this is too difficult a task for a clerk to accomplish," held that the Tampa clerks could determine probable cause for arrest under the ordinance. *Shadwick*, 407 U.S. at 352. Thus, the district court properly reasoned:

> If a clerk of court can be entrusted to issue an arrest warrant, which places a person's liberty at stake, within the bounds of the Fourth Amendment, then this Court can see no reason a clerk of court cannot be entrusted, within the limits of the Due Process Clause, to make the determination whether an appellant's merit brief was filed in accordance with the applicable rule of practice.

The cases cited by Plaintiff in support of his position are easily distinguishable or fail to show that he was denied the due process of law on the ground that the Ohio Supreme Court's vested judicial authority in a non-judicial officer. For example, Plaintiff relies upon *McCray v. Maryland*, 456 F.2d 1 (4th Cir. 1972) for the proposition that a court clerk can be liable under 42 U.S.C. § 1983 when the clerk impedes the filing of papers. However, in *McCray,* the Fourth Circuit, declining to extend the protection afforded by the doctrine of absolute immunity to lesser judicial personnel, held that a court clerk is not entitled to a grant of absolute immunity as a "quasi-judicial" officer with respect to filing papers. *Id.* at

3-4. Indeed, the Fourth Circuit pointed out that such clerical duties are merely ministerial and thus not deserving of being cloaked with judicial immunity. If anything, *McCray* rebuts Plaintiff's claim that the action of a court clerk in filing papers amounts to a function vested with "judicial authority."

Plaintiff's reliance upon *Loya v. Desert Sands Unified High Sch. Dist.*, 721 F.2d 279 (9th Cir. 1983) is also misplaced. In *Loya,* the Ninth Circuit found that it was error to dismiss a Title VII claim as time barred because the claim arrived at the clerk's office within the 90-day limitation period. In *Loya,* the clerk refused to file the complaint because it was typed on 8-1/2 by 13 inch paper in violation of a local court rule requiring 8-1/2 inch by 11 inch paper. There, the Ninth Circuit noted:

> To uphold the Clerk's rejection of it would elevate to the status of a jurisdictional requirement a local rule designed merely for the convenience of the court's own record keeping. While such interests are important, local rules to serve them should not be applied in a manner that defeats altogether a litigant's right to access to the court.

Loya, 721 F.2d at 280. The instant case is clearly distinguishable from *Loya,* since the Supreme Court of Ohio's rule of practice is simply not comparable to the local rule in that case. Here, Plaintiff's filing of the merits brief in the underlying case was deemed untimely because it was filed after the deadline. Similarly, Plaintiff's citation to *McDowell v. Delaware State Police*, 88 F.3d 188 (3d Cir. 1996) in this regard is misplaced. In that case, the Third Circuit found that

the court clerk should have accepted the complaint, as it was filed within the applicable limitations period.

Plaintiff also cannot show that he suffered a due process injury resulting from the enforcement of Rule XIV. Reading the rule in its entirety, the district court pointed out that Rule XIV(3)(B)(2)(a) allows parties to file a one-time stipulation for a twenty-day extension to file a merits brief, if it is otherwise filed within the time the brief is due. Moreover, Rule XIV(3)(B)(2)(b) permits a ten-day extension upon a showing of good cause in the event that there is no stipulation. In addition, a party is permitted under Rule XIV(1)(B)(1)(a) to file pleadings by facsimile transmission, thus eliminating the need to rush to the courthouse at the last minute. As the district court rightly pointed out: "Plaintiff has not explained why he did not pursue any of these other options for filing his brief, but his failure to file his client's brief in compliance with the rules is completely a problem of his own making." Thus, given that "Rule of Practice XIV leaves open several avenues for filing briefs which Plaintiff apparently failed to utilize," the district court properly concluded that there was no due process violation.

Plaintiff also cannot show that the enforcement of Rule XIV affected his right to practice law or his access to the courts as a practicing lawyer. In a word, Plaintiff alleges no facts showing that he was prevented, or will be prevented, from practicing law. Thus, the district court properly concluded that "Rule of Practice XIV did not deprive Plaintiff of his right to practice law nor [did it] close the door to the courthouse."

Plaintiff also fails to state a claim that he was deprived of any privilege or immunity secured by either the Fourteenth Amendment or Article IV, § 2 of the United States Constitution. As the district court properly stated: "The right to practice law is not a privilege or immunity secured by the Fourteenth Amendment." *See In re Griffiths*, 413 U.S. 717, 719 n.4, 37 L. Ed. 2d 910, 93 S. Ct. 2851 (1973) (finding that the holding of *Bradwell v. State*, 83 U.S. 130, 21 L. Ed. 442 (1872) "was simply that the right to practice law is not a 'privilege or immunity' within the meaning of the Fourteenth Amendment"); *Saier v. State Bar of Michigan*, 293 F.2d 756, 759 (6th Cir. 1961) (noting that "the right to practice law in the state courts [is] not a privilege or immunity of a citizen of the United States") (quoting from *In ex parte Lockwood*, 154 U.S. 116, 117, 38 L. Ed. 929, 14 S. Ct. 1082 (1894)). The district court also properly found that the Privileges and Immunities Clause of Article IV, § 2, which prevents states from discriminating against citizens of another state, has no application to this case because Plaintiff is an Ohio lawyer and cannot claim discrimination on this basis. As the Court noted in *Zobel v. Williams*, 457 U.S. 55, 59 n. 5, 72 L. Ed. 2d 672, 102 S. Ct. 2309 (1982),

> The statute does not involve the kind of discrimination which the Privileges and Immunities Clause of Art. IV was designed to prevent. That Clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer v. Witsell*, 334 U.S. 385, 395, 68 S. Ct. 1156, 1161, 92 L. Ed. 1460 (1948). The Clause is thus not applicable to this case.

457 U.S. at 59 n. 5

In addition, Plaintiff's claims against the Supreme Court of Ohio and the officials are barred by the Eleventh Amendment. *See Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 152 L. Ed. 2d 962, 122 S. Ct. 1864 (2002); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1983) ("It is clear, of course, that in the absence of consent, a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment."). While the Eleventh Amendment by its own terms does not bar suits against a state by one of its own citizens, an unconsenting state is nonetheless immune from suits filed in federal court by one of its own citizens as well as by citizens of another state. *Edelman v. Jordan*, 415 U.S. 651, 663-64, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974). Here, the district court properly found that the Ohio statute requiring the Clerk of the Supreme Court to post a bond is not a waiver of the state's Eleventh Amendment sovereign immunity because the statute does not specify the state's intention to subject itself to suit in federal court.[1] *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985) ("In order for a state statute or constitutional provision to constitute a waiver of

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[1] Ohio Revised Code 2503.06 merely requires the clerk to post a bond "conditioned upon the faithful discharge of the duties of his office." Ohio Revised Code 2503.07 states that "the clerk shall be responsible for the neglect of duty or misconduct in office of a deputy." In this regard, Plaintiff does not cite to any statutory language specifically indicating the State of Ohio's intent to waive its immunity under the Eleventh Amendment.

Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in federal court.") Thus, to the extent that Plaintiff is seeking retroactive relief in the form of an injunction or relief in the form of a monetary judgment against the individual Defendants, such relief is barred by the Eleventh Amendment.

Finally, because the district court properly dismissed Plaintiff's federal claims, it properly declined to exercise supplemental jurisdiction over his state law claims pursuant to 28 U.S.C. § 1367(c)(3). *Hankins v. The Gap*, 84 F.3d 797, 802-03 (6th Cir. 1996) (noting that "generally, if the federal claims are dismissed before trial ... the state claims should be dismissed as well") (citations and internal quotation marks omitted). Thus, Plaintiff's claims alleging that Rule XIV violated the Ohio Constitution or Ohio Supreme Court precedent were properly dismissed without prejudice.

CONCLUSION

For the foregoing reasons, we therefore **AFFIRM** the district court's judgment.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-I-00-539

[Filed January 16, 2001]

John H. Metz,	)
Plaintiff,	)
	)
vs.	)
	)
The Supreme Court of	)
Ohio, et al.,	)
Defendants.	)
	)

ORDER

This matter comes before the Court on several outstanding motions filed by the Defendants, including: Defendant Ohio Attorney General Betty D. Montgomery's Motion to Dismiss (Doc. No. 3), Defendant Mary Ann Dix's Motion for Judgment on the Pleadings (Doc. No. 5), Motion to Strike (Doc. No. 10), and Motion to Dismiss (Doc. No. 13).

I. Background

Plaintiff John H. Metz is an attorney from Cincinnati licensed to practice law in the state of Ohio. The Amended Complaint alleges that in July 1998, Plaintiff was representing clients whose merit brief before the Supreme Court of Ohio was due on July 1, 1998. *See* Amended Complaint ¶ 6. According to a rule promulgated by the Ohio Supreme Court, pleadings received in its Clerk's Office after 5:00 p.m. will not be filed until the next business day. *See* Ohio S. Ct. Prac. R. XIV(1) (A). Another section of this rule provides that no brief shall be filed after the established deadline and further directs the Clerk to refuse to file any pleading that is not filed timely. *See* Ohio S. Ct. Prac. R. XIV(1)(C). Rule XIV(1) (C) further prohibits the filing of motions to waive the rule. *See id.*

According to the Amended Complaint, due to an emergency situation that arose on July 1, 1998, "Plaintiff personally finished typing and printing an appropriate number of copies of the merit brief" and then drove to Columbus to file them.[1] Amended Complaint ¶ 6. Plaintiff states that as he arrived in front of the courthouse he called the Clerk's office to inform them that he would be there momentarily with the briefs. When Plaintiff entered the courthouse, a security guard stopped him and asked to see some identification. Thinking he needed to show identification because it was now after hours, Plaintiff asked the guard if it was after 5:00 p.m. The guard

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[1] The amended complaint does not identify the nature of the emergency. However, because Plaintiff "personally" finished typing his brief, the Court assumes that the emergency happened to a member of Plaintiff's support staff, and not to Plaintiff himself.

responded, "No", so Plaintiff hurried to the elevator to go to the Clerk's office. *Id.* ¶¶ 7-8.

When he arrived at the Clerk's office, Plaintiff saw two clerks gathering their belongings to leave and another clerk (later identified as Defendant Mary Ann Dix, Deputy Clerk of the Ohio Supreme Court) talking on the phone. The Amended Complaint indicates that Ms. Dix continued talking on the phone for at least a couple of minutes. During this time, Plaintiff arranged the copies of his brief on the counter for time-stamping. When Ms. Dix hung up the phone, Plaintiff said to her, "I was afraid I was not going to make it." Ms. Dix responded "You didn't. It is after 5:00." Plaintiff then pointed out that several clocks in the office indicated that it was 4:58 or 4:59, but definitely not after 5:00. Ms. Dix then told Plaintiff that once the computers were turned off, the Clerk would not accept any filings and that the computers were now off. She then told Plaintiff that she would be happy to recycle the briefs if he did not want to carry them back to the office but that they would not get before the Court. *Id.* ¶¶ 9-13.

Plaintiff then states that he begged Ms. Dix to be reasonable but she responded that "the clerk decides what time it is." *Id.* ¶ 14. Plaintiff then asked to speak to Defendant Marcia Mengel, the Clerk of the Ohio Supreme Court. Ms. Dix refused that request on the grounds that Ms. Mengel had given her complete authority over filings and that her decision was final. Ms. Dix did agree to take one copy of the brief to be filed as of the next day, but told Plaintiff that it would only be returned as not being filed timely. *Id.* ¶¶ 14-16. On the way out, Plaintiff checked with the security guard, who informed him that he passed through at 4:58 p.m.

Plaintiff then returned to Cincinnati. *Id.* ¶¶ 17-18.

The next day, Plaintiff called the Clerk's office to speak to Ms. Mengel and was informed that she was unavailable due to an extended leave of absence. Plaintiff then spoke with Ms. Dix again, who reiterated the rules of the Court and told Plaintiff it would be futile to seek any further relief because the Court always backs up the Clerk. *Id.* at 18-19.

The following week, on July 16, Plaintiff sent to the Court a pleading with a number of motions regarding the events of July 1.[2] On July 17, Plaintiff received a judgment entry from the Supreme Court indicating that his client's appeal had been dismissed sua sponte for failure to file a merit brief on a timely basis. The same day, Plaintiff received a call from the Clerk's office informing him that it was not going to file his latest pleading because the case had been dismissed. Plaintiff then attempted to file a motion for reconsideration, which Ms. Dix also refused to file because it included language asking the Court to reconsider the Clerk's refusal to file his brief. *Id.* ¶¶ 23-25.

On July 3, 2000, Plaintiff filed a complaint under 42 U.S.C. § 1983 against the Supreme Court of Ohio and the individual justices thereof, Marcia Mengel, the Clerk of the Supreme Court of Ohio, Mary Ann Dix, the Deputy Clerk of

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[2] The motions included a Motion to Grant Emergency Relief, Motion to File Merit Brief and Supplement Instanter, Motion to Not Dismiss Appeal, Motion to Order Correction of Docket, and Motion to Issue Mandate to the Clerk to File Relator's Merit Brief and Supplement. *See* Amended Complaint ¶ 22 n.2.

the Supreme Court of Ohio, and Betty D. Montgomery, the Attorney General of Ohio. Plaintiff later filed an Amended Complaint clarifying in which capacities, individual or official, the Defendants were being sued.

Following the statement of facts, the Amended Complaint becomes somewhat confusing, therefore, the nature of Plaintiff's claims are somewhat difficult to discern. The Amended Complaint first alleges that the Supreme Court of Ohio has "always claimed to be a Court of the People of Ohio" and has a policy that cases should be determined on the merits and not on procedural technicalities. Amended Complaint ¶¶ 26-27. Then, the Amended Complaint goes on to claim, apparently, that Ohio Supreme Court Rule of Practice XIV violates the Ohio Constitution by allowing non-judicial officers to determine what pleadings will be placed before the Court. *See id.* ¶¶ 28-33. Next, the Amended Complaint appears to allege that Rule of Practice XIV violates earlier Ohio Supreme Court case law which held that the power to determine the propriety of any pleading submitted lies with the court and not the clerk. *Id.* ¶¶ 35-38. Treading further into more familiar territory, the Amended Complaint next appears to allege that Rule of Practice XIV violates the Due Process Clause of the Fourteenth Amendment by vesting judicial power in the hands of non-judicial officers. *Id.* ¶¶ 40, 41, 43, 45, 49. The Amended Complaint next alleges that Plaintiff has a property right in practicing law and in the open courts of Ohio, which the application of Rule XIV has deprived him of in this case. *Id.* ¶ 47. Finally, the Amended Complaint alleges that Defendants' application of Rule XIV has violated his privileges and immunities. *Id.* ¶ 50. The Amended Complaint prays for an injunction prohibiting the Ohio Supreme Court from allowing non-judicial employees to

wield judicial power, a ruling that Rule XIV is unconstitutional as applied, and money damages, including punitive damage against Defendants Dix and Mengel.

On July 27, 2000, Attorney General Montgomery filed a motion to dismiss her as a defendant in this action (Doc. No. 3) on the grounds that the Complaint fails to make any specific allegations against her. This motion appears to be unopposed.[3] On August 30, 2000, the remaining Defendants filed a motion for judgment on the pleadings (Doc. No. 5) The Supreme Court of Ohio moves for judgment on Eleventh Amendment sovereign immunity grounds. Defendants also seek judgment on the pleadings to the extent that Plaintiff seeks money damages against the individual Defendants in their official capacities. Next, Defendants move for judgment on Plaintiff's state law claims on the grounds that this Court lacks subject matter over these claims. Finally, Defendants argue that Plaintiff's due process and privileges and

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[3] The Amended Complaint indicates that Plaintiff named Attorney General Montgomery as a defendant pursuant to Ohio Revised Code § 2721.12. *See* Amended Complaint ¶ 54. This statute requires service of the complaint upon the Attorney General whenever a party files a declaratory judgment action challenging the constitutionality of a municipal ordinance. *See* Ohio Rev. Code § 2721.12. However, § 2721.12 does not require that the Attorney General be made a party to such an action. *Ohioans for Fair Representation, Inc. v. Taft*, 616 N.E.2d 905, 907 (Ohio 1993). As Defendants correctly point out, Plaintiff has not alleged any wrongdoing on the part of the Attorney General. Since the Attorney General is not required to be a party to this action and there are no allegations against her, the claims against Attorney General Montgomery are **DISMISSED WITH PREJUDICE**.

immunities claims fail to state claims for relief and should be dismissed.

On September 20, 2000, Plaintiff filed his memorandum in opposition to Defendants' motion for judgment on the pleadings. *See* Doc. No, 7. In his brief, Plaintiff argues that this Court has jurisdiction to enter injunctive relief against the Ohio Supreme Court and its individual members. Plaintiff further argues that the State of Ohio waived its sovereign immunity with respect to Defendants Dix and Mengel because Ohio law requires the clerk of the Ohio Supreme Court to post a bond.

On October 10, 2000, Plaintiff filed a supplemental memorandum to his original memorandum in opposition to the motion for judgment on the pleadings (Doc. No. 9), which Defendants moved to strike on October 19, 2000. *See* Doc. No. 10. On November 3, 2000, Plaintiff filed an Amended Complaint (Doc. No. 12) which clarified that the individual justices of the Ohio Supreme Court are being sued in their official capacities only for purposes of injunctive relief and that Defendants Dix and Mengel are being sued in their individual and official capacities. *See* Amended Complaint ¶¶ 53, 55. In all other material respects the Amended Complaint is identical to the original Complaint.

On November 14, 2000, Defendants filed a motion to dismiss the Amended Complaint (Doc. No. 13). Due to the similarity between the Complaint and the Amended Complaint, this motion essentially reincorporates the grounds for dismissal asserted in the motion for judgment on the pleadings. Additionally, the motion to dismiss argues that Plaintiff's claims are res judicata because Judge Davis of the

Hamilton County Court of Common Pleas granted a motion for judgment on the pleadings on the same claims. Defendants, however, have failed to provide evidence sufficient for the Court to determine whether the issues presented here were fully and fairly litigated in state court. Therefore, the Court declines to address Defendants' res judicata argument.

The outstanding motions have been fully briefed and are now ripe for disposition.

II. Standard of Review

A court ruling on a motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure employs the same standard of review as is used to rule on motions to dismiss pursuant to Rule 12(b) (6). *Pelfrey v. Chambers*, 43 F.3d 1034, 1038 (6th Cir. 1995).

A motion to dismiss pursuant to Rule 12 (b) (6) operates to test the sufficiency of the complaint. In its consideration of a motion to dismiss under Rule 12(b) (6), the court is required to construe the complaint in the light most favorable to the Plaintiff and accept all well-pleaded factual allegations in the complaint as true. *Scheuer v. Rhodes*, 416 U S. 232, 236 (1974) and *Roth Steel Products v. Sharon Steel Corp.*, 705 F.2d 134, 155 (6th Cir. 1983). A court, however, will not accept conclusions of law or unwarranted inferences which are presented as factual allegations. *Blackburn v. Fisk University*, 443 F.2d 121, 124 (6th Cir. 1974). A court will, though, accept all reasonable inferences that might be drawn from the complaint. *Fitzke v. Shappell*, 468 F.2d 1072, 1076-77 n.6 (6th Cir. 1972).

When considering the sufficiency of a complaint pursuant to a Rule 12(b) (6) motion, this Court recognizes that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-6 (1957).

III. Analysis

Before turning to the merits of the individual motions, the Court first raises sua sponte the issue of Plaintiff's standing to raise due process challenges to Ohio Supreme Court Rule of Practice XIV due to a lack of injury-in-fact. A plaintiff's Article III standing is a component of a federal court's subject matter jurisdiction. *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 622 (6th Cir. 2000). A district court may sua sponte raise the issue of its subject matter jurisdiction over the case. *Miller's Cove Energy Co., Inc. v. Moore*, 128 F.3d 449, 450 (6th Cir. 1997).

The standing requirements of Article III of the United States Constitution dictate that there be a live controversy at each stage of the litigation in federal court. In order to have standing, the plaintiff must meet three requirements: i) the plaintiff must have suffered injury in fact - an invasion of a legally protected interest which is concrete and particularized, and actual and imminent; 2) there must be a causal connection between the injury and the conduct complained of - the injury must be traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court; and, 3) it must be likely, and not merely speculative, that the plaintiff's injury will be redressed

by a favorable decision from the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

As noted, the Court questions whether Plaintiff's due process claims satisfy the injury-in-fact requirement. The Court observes that the Clerk's refusal to accept Plaintiff's brief and the Supreme Court's subsequent dismissal of the case deprived Plaintiff's client of his or her cause of action, certainly constituting an injury to the client. The Court, however, can see no discernible due process injury to Plaintiff. In fact, the only injury to Plaintiff from the summary dismissal of his client's case, that this Court can discern, is Plaintiff's possible exposure to a malpractice action because of his failure and/or inability to file his client's brief in a timely fashion. However, Plaintiff's interest in heading off a malpractice suit is merely a byproduct of his client's due process interests and this "byproduct" interest in a lawsuit is insufficient to satisfy Article III's injury-in-fact requirement. *See Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 120 S. Ct. 1858, 1862 (2000). Therefore, the Court would conclude that Plaintiff lacks standing to pursue any due process claim regarding the Clerk's summary rejection of his client's merit brief.

In any event, the Court rejects Plaintiff's contention that Ohio Supreme Court's alleged vesting of judicial authority in a non-judicial officer constitutes a violation of the Due Process Clause. In *Shadwick v. City of Tampa*, 407 U.S. 345 (1972), the U.S. Supreme Court held that a municipal ordinance which allowed the clerk of court to issue arrest warrants for breaches of other municipal ordinances did not violate the Fourth Amendment. *Id.* at 345-46, 352. Commenting on the skill and training needed to determine

whether probable cause to issue an arrest warrant exists, the Court stated:

> We presume from the nature of the clerk's position that he would be able to deduce from the facts on an affidavit before him whether there was probable cause to believe a citizen guilty of impaired driving, breach of peace, drunkenness, trespass, or the multiple other common offenses covered by a municipal code. There has been no showing that this is too difficult a task for a clerk to accomplish. Our legal system has long entrusted nonlawyers to evaluate more complex and significant factual data than that in the case at hand. Grand juries daily determine probable cause prior to rendering indictments, and trial juries assess whether guilt is proved beyond a reasonable doubt The significance and responsibility of these lay judgments betray any belief that the Tampa clerks could not determine probable cause for arrest.

Id. at 351-52. If a clerk of court can be entrusted to issue an arrest warrant, which places a person's liberty at stake, within the bounds of the Fourth Amendment, then this Court can see no reason a clerk of court cannot be entrusted, within the limits of the Due Process Clause, to make the determination whether an appellant's merit brief was filed in accordance with the applicable rule of practice. This task unarguably takes less skill than making probable cause determinations and the Court does not believe that allowing the clerk to reject those pleadings which are not compliance with the rules of

practice violates any constitutional right of Plaintiff.

This conclusion is reinforced when one reads the entirety of Rule of Practice XIV which while ultimately imposing a harsh penalty for non-compliance, as Plaintiff's case perhaps illustrates, is not as rigid and unyielding as Plaintiff's pleadings would have one believe. The Court observes that Rule XIV(3) (B) (2) (a) permits parties to file a one-time stipulation for 20 day extension to file a merit brief, a liberal practice which this Court does not allow, if otherwise filed within the time the brief is due. If a stipulation cannot be reached, under Rule XIV(3) (b) (2) (b) a party may obtain a 10 day extension upon a showing of good cause. Rule XIV(1) (B) (i) (a) permits both of these pleadings to be filed by facsimile transmission, thereby easing the logistical burden of obtaining an extension. Plaintiff has not explained why he did not pursue any of these other options for filing his brief, but his failure to file his client's brief in compliance with the rules is completely a problem of his own making.

"Time" is a metaphysical concept. Common experience teaches that rarely will two clocks show the same time. Everyday life is not synchronized with the atomic clock at the Naval Observatory. Thus, whether it was 4:58 p.m., as the security guard's log reflected, or 4:59 p.m., as the clock on the wall of the Clerk's office showed, viewing the facts in the light most favorable to Plaintiff, it was clearly close enough to the "real" 5:00 p.m. that Ms. Dix could not have abused her discretion or violated Plaintiff's due process rights by determining that the "official" time for the filing of Plaintiff's brief had elapsed. Therefore, the Court finds no merit in Plaintiff's due process claims.

The Court similarly finds Plaintiff's other claims without merit. Rule of Practice XIV did not deprive Plaintiff of his right to practice law nor close the door to the courthouse. Indeed, Rule of Practice XIV leaves open several avenues for filing briefs which Plaintiff apparently failed to utilize The application of Rule of Practice XIV did not deprive Plaintiff of any privilege or immunity secured by either the Fourteenth Amendment or Article IV, §2 of the Constitution. The right to practice law is not a privilege or immunity secured by the Fourteenth Amendment. *See In re Griffiths*, 413 U.S. 717, 719 n.4 (1973); *Bradwell v. Illinois*, 83 U.S. 130, 138-89 (1872). The Privileges and Immunities Clause of Article IV, § 2 prevents states from discriminating against citizens of another state, but has no applicability where a law affects the citizen of the same state. *See United Bldg. & Constr. Trades v. City of Camden*, 465 U.S. 208, 217 (1984); *Zobel v. Williams*, 457 U.S. 55, 59 n.5 (1982); *Maldonado v. Houston*, 157 F.3d 179, 190 (3rd Cir. 1998).

Finally, to the extent that Plaintiff claims that Rule of Practice XIV violates the Ohio Constitution or Ohio Supreme Court precedent, this Court is without subject matter jurisdiction. The Eleventh Amendment bars suits in federal court against state officials who have allegedly violated state law. *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 120-21 (1983); *McNeilus Truck & Mfg., Inc. v. State of Ohio ex rel. Montgomery*, 226 F.3d 429, 438 (6th Cir. 2000). The Court agrees with Defendants that Plaintiff's contention that the Ohio statute requiring the Clerk of the Supreme Court to post a bond is not a waiver of the state's Eleventh Amendment sovereign immunity because the statute is not an explicit agreement to be sued in federal court. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985)

("[I]n order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in federal court") Alternatively, upon dismissal of Plaintiff's other federal claims, the Court declines to exercise supplemental jurisdiction over Plaintiff's purely state-law claims pursuant to 28 U.S.C. § 1367(c) (3). *See Hankins v. The Gap*, 84 F.3d 797, 802-03 (6th Cir. 1996).

Conclusion

In conclusion, the Defendants' Motion to Dismiss (Doc. No. 3) is well-taken and is **GRANTED**; the claims against Attorney General Montgomery are **DISMISSED WITH PREJUDICE**. Defendants' Motion for Judgment on the Pleadings (Doc. No. 5) and Motion to Dismiss (Doc. No. 13) are **GRANTED IN PART**. The Court finds that Plaintiff lacks Article III standing to assert his due process claims. Therefore, those claims are **DISMISSED WITHOUT PREJUDICE**. Alternatively, no due process violation occurred. The Court finds, however, that Plaintiff's claims under the Privileges and Immunities Clauses are without merit, and, therefore, they are **DISMISSED WITH PREJUDICE**. The Court lacks subject matter jurisdiction over Plaintiff's pendent state law claims. Alternatively, the Court declines to exercise supplemental jurisdiction over those claims. In either event, Plaintiff's state law claims are **DISMISSED WITHOUT PREJUDICE**. In light of these rulings, Defendants' motion to strike (Doc. No. 10) is **MOOT. THIS CASE IS CLOSED**.

IT IS SO ORDERED

Date January 12th, 2001

/s/ _____
Sandra S. Beckwith
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No.: C-1-00539

[Filed November 3, 2000]

JOHN H. METZ
44th Floor Carew Tower
441 Vine Street
Cincinnati, Ohio 45202,
Plaintiff,

vs.

THE SUPREME COURT OF OHIO
30 E. Broad Street
Columbus, Ohio 43266-0419

and

MARY ANN DIX
Deputy Clerk, Ohio Supreme Court
Supreme Court of Ohio
30 E. Broad Street
Columbus, Ohio 43266-0419

and

MARCIA J. MENGEL
Clerk, Ohio Supreme Court
Supreme Court of Ohio
30 E. Broad Street
Columbus, Ohio 43266-0419

and

THOMAS J. MOYER
Chief Justice, Ohio Supreme Court
Supreme Court of Ohio
30 E. Broad Street
Columbus, Ohio 43266-0419

and

DEBORAH L. COOK
Justice, Ohio Supreme Court
Supreme Court of Ohio
30 E. Broad Street
Columbus, Ohio 43266-0419

and

EVELYN LUNDBERG STRATTON
Justice, Ohio Supreme Court
Supreme Court of Ohio
30 E. Broad Street
Columbus, Ohio 43266-0419

and

FRANCIS E. SWEENY
Justice, Ohio Supreme Court
Supreme Court of Ohio
30 E. Broad Street
Columbus, Ohio 43266-0419

and

PAUL E. PFEIFER
Justice, Ohio Supreme Court
Supreme Court of Ohio
30 E. Broad Street
Columbus, Ohio 43266-0419

and

ANDREW DOUGLAS
Justice, Ohio Supreme Court
Supreme Court of Ohio
30 E. Broad Street
Columbus, Ohio 43266-0419

an

ALICE ROBIE RESNICK
Justice, Ohio Supreme Court
Supreme Court of Ohio
30 E. Broad Street
Columbus, Ohio 43266-0419

and

BETTY D. MONTGOMERY)
Attorney General of Ohio)
30 E. Broad Street)
17th Floor)
Columbus, Ohio 43266-4320,)
Defendants.)
_____)

[Judge Beckwith]

PLAINTIFF'S FIRST
AMENDED COMPLAINT
CLAIM OF UNCONSTITUTIONALITY
[Demand for Jury Trial]

1. Plaintiff brings this action pursuant to 42 U.S.C. Section 1983.

2. Plaintiff is a citizen and resident of the State of Ohio presently and at all times pertinent to the allegations herein.

3. Defendant Dix was and continues to be a Deputy Clerk of the Supreme Court of Ohio for all times pertinent to the allegations herein.

4. Defendant Mengel was and continues to be the Clerk of the Supreme Court of Ohio for all times pertinent to the allegations herein.

5. Defendant Supreme Court of Ohio is a constitutionally created entity pursuant to Ohio Constitution Article IV, Section 1, and operates by and through its individual justices.

I. Clerk's Refusal to Accept Merit Brief on July 1st, 1998.

6. Plaintiff, as a duly licensed attorney by the State of Ohio, was representing clients whose Merit Brief was due on July 1st, 1998 [Sup. Court Appeal #98-750]. Due to an emergency situation on July 1st, Plaintiff personally finished the typing and printing of an appropriate number of copies of the Merit Brief and drove to Columbus from Cincinnati for Filing on July 1, 1998.

7. Plaintiff called ahead on cellular phone to the Supreme Court clerk's office and in fact called again while literally out in front of the court building informing the clerk's office that plaintiff was on his way upstairs.

8. Plaintiff entered the building and was stopped by a guard who insisted Plaintiff present identification. Plaintiff asked, "Is it after 5:00 p.m.?" thinking the guard may have meant that the building was closed and identification was needed to enter atter hours. The guard answered, "No," but it was standard practice now to obtain identification. Plaintiff gave his bar card to the guard and tolf him to go ahead and keep it, he would pick it up later, and he immediately got on the elevator.

9. At this time there were two young ladies (presumably clerks) at their desks who were in the process of beginning to gather their things together to leave. Plaintiff stood there and observed another lady on the

phone standing next to the counter, who was later identified as Ms. Dix.

10. Plaintiff overheard Ms. Dix say to whomever was on the phone, "I have someone here..." Plaintiff then realized that he apparently had time to take out the copies of the Merit Brief and the supplement. Plaintiff did this and even had enough time to arrange them conveniently in rows in order for the clerk to stamp them on the top of the counter. Still Ms. Dix remained on the phone.

11. Plaintiff heard Ms. Dix again tell the caller, "I have someone here." Only shortly thereafter did Ms. Dix Finally get off the phone.

12. Plaintiff stated: "I was afraid I was not going to make it." Ms. Dix said, "You didn't. It is after 5:00." Plaintiff begged to differ with her since the clocks indicated that the clocks indicated it was 4:58 or 4:59 but it was clearly <u>not AFTER</u> 5:00. Ms. Dix said that once the computers are off the clerk will not accept any filings and then she contended the computers were off now.

13. Ms. Dix said that she would be happy to "recycle" into the trash Plaintiff's briefs and supplements if Plaintiff did not want to carry them back to his office, but that "they will not get before the court," said Ms. Dix.

14. Plaintiff literally pleaded with Defendant Dix for some reasonableness. Defendant Dix informed Plaintiff that

"the clerk decides what time it is." Plaintiff asked if he should speak to the Clerk, Ms. Mengel. Dix wanted to know why, because Dix said that Ms. Mengel had given her (Dix) "complete authority over 'filings'" and that she (Dix) would still make the final determination.

15. Plaintiff said that he would take it up further, but Ms. Dix informed him that there "was no higher" person to approach; there was non "higher" than she.

16. Ms. Dix informed Plaintiff that any document which is presented after 5:00 will be filed the next day. With this, Plaintiff asked her if she would accept his filings with that understanding. Dix refused to take any but one of the merit brief and one supplement. She informed Plaintiff that she would just send it back to the plaintiff the following day showing that they were not filed timely.

17. Plaintiff went downstairs and spoke with Officer Underwood and asked if he could check what time he noted Plaintiff's presence going through security. The sign-in sheet noted 16:58 (4:58 p.m.). This time is the last thing charted, after name, etc.

18. Plaintiff returned to Cincinnati that evening (July 1, 1998). The next morning (July 2, 1998) Plaintiff called the Clerk's office and asked to speak to Ms. Mengel. Plaintiff identified himself ans was informed that she was on "extended leave" and that he could instead talk to Ms. Dix. Plaintiff indicated that that would not seem fruitful. However, the person

nonetheless put Ms. Dix on the phone.

19. Ms. Dix again rather curtly reiterated the language of the rules, i.e., that filings will not be accepted it untimely; and the appeal will be dismissed. Several times she assured Plaintiff of the futility of trying to seek any relief since the court "always" backs up the clerk.

20. Ms. Dix informed plaintiff that she was sending the documents back. Plaintiff did receive (on July 9th) the documents in the mail. However, the documents were not filed "on the next day" per rule. Instead, Ms. Dix merely wrote on each document, "Received in the clerk's office after 5:00 p.m. on July 1st, 1998."

II. Clerk's Refusal to File Motions for Emergency Relief; Motion to Not Dismiss Appeal; Motion to Correct the Docket

II

21. Within the week, on Thursday, July 16th Plaintiff sent via Federal Express (next day service) a pleading containing multiple motions[1] for the Supreme Court to address regarding the deputy clerk's refusal to accept the filings on July 1st.

22. The next morning, Friday, July 17th, Plaintiff received in the mail a "Judgment Entry" reflecting the

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[1] Relators' Motion: to Grant Emergency Relief; to File Merit Brief and Supplement instanter; to Not Dismiss Appeal; to Order Correction of the Docket; to Issue a Mandate to the Clerk to File Relator's Merit Brief and Supplement.

sua sponte dismissal of the within appeal for not filing "a merit brief, due July 1st, 1998." This Entry was date-stamped "July 10th," yet the post-mark was July 14th.[2]

23. In the morning on July 17th, counsel received a call from Amy at the Supreme Court Clerk's Office. Amy notified plaintiff that they had received the Federal Express filings but since the ease had already been dismissed, they were refusing to file that pleading also.

III. Clerk's Refusal to, File Motion for Reconsideration

24. On Friday, July 17th, after learning for the first time that our appeal had been dismissed on July 10th, and that our motion was rejected, Plaintiff then had merely the weekend to draft a Motion for Reconsideration which is specifically provided for under the Ohio Supreme Court Rule XI, Section 2. Plaintiff spent Saturday drafting same and had it Federal Expressed to the Clerk for filing on Monday, July 20th (which would have been the 10th and last day from July 10th to file such motion, and therefore timely).

25. Plaintiff was somewhat not surprised (by this time) to learn that on Monday, July 20th, deputy clerk Dix decided that our Motion for Reconsideration had

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[2] Likewise, the letter from Ms. Dix of July 2nd returning the Merit Brief and Supplement was post-marked "July 6th" and not received until July 9th [i.e., each mailing was post-marked four days later].

language that asked the court "in the alternative" to reconsider the clerk's refusal to file prior filings; that such "document incorporates your request for reconsideration into ***the impermissible motion,*** the document cannot be file." For the third time the deputy clerk read, decided and rejected and refused to file our pleadings with the Supreme Court of Ohio.

26. The Supreme Court of Ohio always claimed to be a Court of the People of Ohio. The Supreme Court of Ohio has repeatedly pronounced this philosophy in its case law and its assurances that the Ohio Constitution, Art. I, Sec. 16, is reinforced and the courts are "open" to the citizens.

27. The Ohio Supreme Court has repeatedly held that cases should be determined **"on the merits"** and not strict technicalities. The Ohio Supreme Court has repeatedly upheld the "basic tenet of Ohio jurisprudence that cases should be determined on their merits and not on mere procedural technicalities." ***(Barksdale v. Van's Auto Sales, Inc.*** (1988), 38 Ohio St.3d 127; ***Maritime Mfrs. v. Hi-Skipper Marina,*** 70 Ohio St.2d 257, 436 N.E.2d 1034-1035; ***State v. Herzing*** (1985), 18 Ohio St.3d 337, 18 OBR 379, 481 N.E,2d 593; ***Perotti v. Ferguson*** (1983), 7 Ohio St.3d 1, 70BR 256, 454 N.E.2d 951; ***DeHart v. Aetna Life Ins Co.*** (1982), 69 Ohio St.2d 189, 23 O.O.3d 210, 431N.E.2d 644).

28. Supreme Court of Ohio Rule of Practice XIV, Sec. 4(C) reiterates that the Court may act upon a motion for a procedural order or "emergency relief" when the

"interests of justice warrant immediate consideration. Certainly, the particular facts in this matter were deserving of such consideration in the "interests of justice." However, here the deputy clerk has determined through her own discretion that the justices of the Ohio Supreme Court would not even see the filings upon which the justices may exercise their own self-described "emergency relief" or "interests of justice."

29. Sup. Ct. Rule of Practice XIV, Sec. 2(A) permits the addition of an additional day onto the computation where the clerk's office is dosed to the public "... **before the usual closing time** on that day, then the act may be performed on the next day that is not a Saturday, Sunday, or legal holiday." If the government of the State of Ohio is open to the public in all other departments and aspects to the "usual closing time," why should the Supreme Court's clerk's close earlier?

30. The Ohio Constitution clearly empowered the Court to use reasonableness and common sense. A procedural rule cannot place the key to the courthouse in the pocket of an un-elected deputy clerk. Ohio's Constitutional judicial powers pursuant to Article IV are entrusted to elected judges, not to front-desk civil servants' whims and discretions.

31. The **Ohio Constitution Article IV, Section 1,** states:

> **"Section 1. In whom judicial power vested.**
>
> The **judicial power** of the state is vested in **a supreme court,** court of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the supreme court as may from time to time be established by law."

32. **Ohio Revised Code 2503.11** General duties of clerk provides:

> "The clerk of the supreme court shall prepare the necessary dockets, attend the sessions, enter and record the orders, judgments, decrees and proceedings of the supreme court and supreme court commission, and issue necessary write and process."

33. The power of the supreme court lies with the justices, not with a deputy clerk or even the clerk herself.

34. Ms. Mengel is responsible for the actions of Ms. Dix. ORC 2503.06 requires the Clerk to post a bond "conditioned upon the faithful discharge of the duties of his office." ORC 2503.07 states:

> "With the approval of the supreme court, the clerk of the supreme court may appoint two deputy clerks for the court... The clerk shall be responsible for the neglect of duty or misconduct in office of a deputy."

35. Both Defendants Dix and Mengel are, however, "simply ministerial officers of this Court," and must abide by the laws of Ohio.

36. The Ohio Supreme Court has previously held in ***The State ex rel. Wanamaker v. Miller*** (1955) 164 Ohio St. 176, 128 N.E.2d 110, involving the supreme court's refusal to accept a fling, that:

> **"The power to make any decision as to the propriety of any paper submitted or as to the right of a person to file such paper is vested in the court, not the clerk."**

37. Even assuming arguendo that the deputy clerk had the judicial power to overrule "the basic tenets" of Ohio law and refuse to file Relator's Merit Brief on July 1st when Counsel was in the clerk's office with all copies on the clerk's desk; the deputy clerk did not and does not have judicial interpretation power to reject for filing the subsequent documents; i.e., 1) Relator's Motion to Grant Emergency Relief ("received" but refused filing on July 17th); 2) Relator's Motion for Reconsideration ("received" but refused filing on July 20th).

38. Defendants have exercised judicial power outside their jurisdiction to the irreparable harm of relators and there is no adequate remedy at law; particularly when respondents continually block access to judicial review.

39. Defendants have a clear legal duty pursuant to the law of Ohio to "accept any paper presented" to them for filing. Any decision as to the "propriety of any paper submitted or as to the right of a person to file such a paper is vested in the Supreme Court, not in the clerk."

40. If the Clerk is insisting on strict adherence to Sup.Ct.Prac.R. XIV, Sec. 1 (C) "Prohibition Against Untimely Filings," then one must address the constitutionality of such a rule itself. A rule cannot be made that deprives and divests this Court of its Constitutional power.

41. The clerk's reliance upon such interpretation of such rule would literally and effectively divest the Supreme Court of Ohio of its "power to make any decision as to the propriety of" ilings. This judicial function would be translated into the clerk's discretion. Such delegation is clearly unconstitutional and should not be employed in this fashion to deny due process to a citizen.

42. Ohio Supreme Court Rule XI, Section 2(C) states:

> "The Clerk shall refuse to file a motion for reconsideration that is not expressly permitted by this rule or that is not timely."

43. Ohio Supreme Court Rule XI, Section 2(C) and any other Ohio Supreme Court rule which vests judicial authority in the hands of an un-elected non-judge person is unconstitutional and should be held as void

and stricken.

44. When a state or an arm or entity of a state violates Constitutional rights of its citizens, a federal court can and should enter injunctive relief monetary and whatever other relief the court deems appropriate under the circumstances.

45. This office of the Clerk of the Supreme Court has utilized its discretionary powers against other citizens, including the Attorney General's office itself, and once again the public saw splashed across the media where a filing was allegedly "one minute" late and was not accepted by this same office. So the threat of continuing violation is quite real.

46. Supreme Court Rule of Practice XIV, Section 1(C) is unconstitutional as applied in that it states: "Motions to waive this rule [timely filings] are prohibited and shall not be filed." This rule abolishes any equitable judicial powers to consider any exceptions and does not keep the courts open to its citizens.

47. Plaintiff is a duly licensed attorney in the State of Ohio and has a property fight in pursuing his profession, which includes the open courts of the State of Ohio.

48. Plaintiff has spent over 50 hours of his time attempting to rectify this unconstitutional situation and has lost time from working on his other clientele's cases.

49. If the courts are not "open" but only work at the discretion of non-judicial, non-elected employees, such violates the United States Constitution and the Ohio Constitution's Due Process clauses.

50. The actions of Defendants herein infringe and violate the privileges and immunities of Plaintiff.

51. Plaintiff filed writs of prohibition and Mandamus as original actions with the Ohio Supreme Court to address this very case and all actions were dismissed and not heard on the merits. Therefore, plaintiff has exhausted all judicial means to address these ongoing constitutional violations.

52. The Supreme Court is composed of the following justices: Thomas J. Moyer, Beborah L. Cook, Evelyn Lundberg Stratton, Francis E. Sweeny, Paul E. Pfeifer, Andrew Douglas and Alice Robie Resnick.

53. The Defendant justices are named defendants for the purposed of injunctive relief.

54. The Attorney General is named as a party herein to give appropriate notice pursuant to O.R.C. 2721.12, if applicable or other notice requirements and to allow the Attorney General to perform her legal representative duties as appropriate herein.

55. Defendants Dix and Mengel are named in their official capacities for the purposes of injunctive relief, and in their personal capacities for the purposes of injunctive and monetary relief.

56. Defendants Dix and Mengel's conduct under color of state law caused a constitutional deprivation of Due Process, to wit: exercising judicial authority in clear violation of the Ohio Constitution, Ohio law, and United States Constitution.

57. Defendants Dix and Mengel's enforcement of Sup.Ct.Prac.R. XIV Sec. 1(C) and Sup.Ct.Prac.R. XI 2(C) caused a violation of the federally protected right to Due Process, to wit: exercising judicial authority in clear violation of the Ohio Constitution, Ohio law, and the United States Constitution.

WHEREFORE, Plaintiff prays that this Court enters an injunction prohibiting the Ohio Supreme Court, the deputy clerk of the Ohio Supreme Court, the clerk of the Ohio Supreme Court or any other non-judicial employee of the Supreme Court of Ohio from usurping judicial power and thereby having a substantial portion 0f Ohio's common law overruled by non-judicial personnel; to rule Supreme Court Rule of Practice XIV, Sec. 1(C) and Ohio Supreme Court Rule XI, Section 2(C) unconstitutional as applied; and for further injunctive, monetary and other relief, including punitive damages against Defendants Dix and Mengel, as may be appropriate under the circumstances.

Jury Demand

Plaintiff hereby demands that the within action be heard by a jury pursuant to Fed.R.Civ.P. 38.

Respectfully submitted,

/s/ _____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon all counsel of record via ordinary U.S. mail, postage prepaid, this 3rd day of November, 2000.

/s/ _____
John H. Metz [#0019039]